Supreme Court, U.S.
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No. 97-1284

In The

Supreme Court of the United States

October Term, 1997

FAYETTE COUNTY BOARD OF EDUCATION,

Petitioner,

vs.

LGP SR., TP, LGP JR.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Circuit Court of Appeals committed error in affirming the United States District Court decision finding that a disabled student who had reached the age of eighteen (18) was a resident of the state in which his parents resided for the purpose of the receiving a free and appropriate education under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400, *et seq.*

RULE 29.6 STATEMENT

The parties to the proceeding below were the Fayette County Board of Education, Petitioner, and LGP SR., T.P., and LGP JR., Respondents. There is no corporate affiliation of any party to this proceeding.

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This case involves a decision of the Sixth Circuit Court of Appeals affirming the decision of the United States District Court for the Eastern District of Kentucky at Lexington which affirmed an administrative decision of the Kentucky Department of Education. The decision found the Respondent at all times relevant a resident of Fayette County, Kentucky, the residence of his parents. As a resident of Fayette County, Kentucky the Petitioner owed the child a free and appropriate education pursuant to 20 U.S.C. § 1400, *et seq.* (Hereinafter IDEA).

STATE REGULATION INVOLVED

707 KAR 1:180(11). App. A.

707 KAR 1:180 § 9(2)(a)(1) and (2). App. B.

STATEMENT OF CASE

The action below was filed in United States District Court by the Petitioner appealing the decision and order of the Exceptional Children Appeals Board, Department of Education, Commonwealth of Kentucky (hereinafter Appeals Board dated July 31, 1995). This action arose from a due process complaint filed by the Respondent in December 1994 (pursuant to 707 KAR 1:180). The due process request was filed after the Petitioner unilaterally terminated educational services to the child on December 8, 1994.

The parties stipulated during the administrative process that the student was a child with a disability eligible for educational services pursuant to IDEA and state implementing regulations. The issue sought to be reviewed was the residency status of the child after his family moved to Fayette County, Kentucky, from Bristol, Connecticut.

The parties submitted the issue to Hearing Officer Hon. Patricia Walker Fitzgerald. The Hearing Officer found at all times relevant the child to be a resident of Fayette County eligible for educational services. The Petitioner appealed the Hearing Officer's decision to the Exceptional Children's Appeals Board, Kentucky Department of Education. The Appeals Board affirmed the Hearing Officer's decision. The Petitioner was dissatisfied with the well-reasoned opinion rendered during the administrative process. The Petitioner filed a complaint in United States District Court at Lexington, Kentucky, requesting review. The District Court's jurisdiction over the issue was pursuant to 20 U.S.C.A. § 1415(e)(14) as well as 20 U.S.C.A. § 1415(e)(1). During this time the Petitioner continued to deny the child services.

The Respondent moved the District Court for injunctive relief in December 1995. The court ordered the Petitioner to provide educational services to the child dating from November 1, 1985 until June 1996, the expiration of the current Fayette County School year. The court further stated that services could be continued for the child if it was the consensus of the Admission and Release Committee that it was in his best educational interest.

Prior to the court's December 1995 ruling the parents obtained guardianship of their son pursuant to KRS 387, *et seq*. The parents were legally required to obtain guardianship because their son was to reach the age of emancipation (twenty-one (21) in Kentucky due to his disability and KRS 2.015) in November 1995. The Fayette District Court found the child to be a resident of Fayette County, Kentucky, and awarded the parents guardianship.

On September 9, 1996 the United States District Court found that the child became a resident of Kentucky when his

parents established their residence in state (June 1994). By per curiam opinion rendered November 6, 1987 the United States Court of Appeals for the Sixth Circuit affirmed the District Court's opinion concerning residency of the child.

SUMMARY OF THE ARGUMENT

The Petitioner has presented this case as one involving a relationship between state law involving guardianship and incompetency of a disabled child over the age of eighteen (18), the residency of the child and the educational duty owed to the child pursuant to state law and IDEA. In 1996 the Sixth Circuit decision in *Wise v. Ohio Department of Education,* 80 F.3d 177 (6th Cir. 1996) effectively answered the question of a duty owed to a child placed out of district for educational purposes. The court in clear terms stated that the state educational agency shall be responsible for assuring that all children with disabilities within the state receive educational services. The Sixth Circuit continued to state Congress defined "within" (the state) as including children whose parents reside in the state but who receive services in or from another state. (at 182).

The Petitioner can only advance his argument by attempting to convince the Court that when the Respondent LGP, Jr., became eighteen (18) years of age he was emancipated. At that point LGP, Jr., was competent to make his own decisions concerning his residence and his educational placement. The fallacy of the Petitioner's argument is that it fails to address the significance of KRS 2.015. The statute establishes the age of emancipation for a disabled Kentucky child to be twenty-one (21) all other provisions of Kentucky law not withstanding.

REASONS FOR DENYING THE WRIT

I.

THE COURT HAS NOT BEEN PRESENTED A COMPELLING REASON TO GRANT CERTIORARI BY THE PETITIONER.

The parties agree that Congress in drafting IDEA did not define residency for the purposes of providing educational services. However, Congress did direct states to develop plans for providing a "free and appropriate education for all children between the ages of three (3) and twenty-one (21) within the state (20 U.S.C. § 1412(2)(B)). In order to receive federal financial assistance under IDEA a state must develop a plan to provide a free and appropriate education to all children residing in the state between ages three (3) and 21 (twenty-one) 20 U.S.C.A. § 1412(a)(1)(A).

The facts are not in dispute. When the Respondents moved to Fayette County, LGP, Jr., had been placed by the Bristol, Connecticut, Schools at Au Clair Palms, Mt. Dora Florida. It was consensus of the Admissions and Release Committee in Bristol that the Respondent could receive a free and appropriate education at the facility. It is also undisputed that the child is severely disabled with an I.Q. of approximately 40.

The appropriate nature of the child's placement at Au Clair was never questioned by the Petitioner during the months of August 1994 through December 1994. The Admissions and Release Committee deemed it an appropriate placement and paid the child's tuition until they choose to unilaterally terminate services.

As has been previously stated in *Wise* "a child might be placed in another state but is considered a resident of the state

in which his parents reside." Likewise, the Second Circuit in *Catlin v. Sobol,* 93 F.3d 1112 (2nd Cir. 1996) held "Thus, the statute assigns ultimate responsibility, including financial responsibility, to the home district and state the place where the parents reside." Pursuant to the court's well-reasoned opinions the district of residence for the child was Fayette County.

The Petitioner's reliance on *Susan R.M. v. Northeast Independent School District,* 818 F.2d 455 (5th Cir. 1987) is misplaced. The Petitioner's attempts to convince this Court that there is a split in the circuits demand this Court's review. The Plaintiff's assessment is erroneous. *Susan R.M.* is easily distinguished from the Respondent's case. *Susan R.M.* addressed standing to bring an action for deprivation of an appropriate education to a child who had reached the age of eighteen (18); *Susan R.M.* did not address the issue of residency.

In *Susan R.M.* the child's father brought suit on behalf of his disabled daughter claiming a violation of the Education for All Handicapped Children Act. 20 U.S.C. § 1401, *et seq.* The District Court dismissed the action because the child had reached the age of emancipation, eighteen (18) in Texas. The Fifth Circuit Court affirmed the District Court's decision that the father lacked standing to challenge the denial of appropriate education for his daughter..

The important distinction between *Susan R.M.* and the Sixth Circuit decision is the application of state law. The application of Kentucky statutory provisions establish that LGP. Jr., was not emancipated until he reached the age of twenty-one (21). The parties solely responsible for his educational well being were his parents. *See* KRS 405.020(2). Additionally, Texas Code 129.001 defines age of majority as eighteen (18) years. KRS 2.015 states

> that all persons of the age of eighteen are of the age of majority except for purpose of care and treatment of children with disabilities which twenty-one (21) is the age of majority. All other statues to the contrary not with-standing.

The distinction between the two statutes is obvious and while the Fifth Circuit Court's analysis in *Susan R.M.* was correct, the application by the Sixth Circuit was proper under the facts of L.G.P.

II.

THE FAYETTE DISTRICT COURT PROPERLY AWARDED GUARDIANSHIP TO THE PARENTS DUE TO CHILD'S RESIDENCY.

In October 1995 the parents were appointed guardians of the child prior to his twenty-first birthday pursuant to the provisions of KRS 387, *et seq.* KRS 387.520(2) limits the jurisdiction of the Fayette District Court to appointment of guardianship for individuals in the county where the Respondent or ward resides, or where the parents of the ward reside if the ward is a minor. Fayette District Court found the child a resident with full knowledge of his placement in Florida.

The evidence presented to the court clearly established the child with an I.Q. of 40 could not form the intent to determine his residency. Without the ability to form the knowledgeable intent to express his own wishes concerning residency the residency becomes that of his parents. *Martinez v. Bynum,* 461 U.S. 330, 103 S. Ct. 1838, 75 L. Ed. 2d 879 (1984) *See also Wise.*

III.

FAYETTE COUNTY FAILED TO APPOINT A REPRESENTATIVE OF THE CHILD.

The Petitioner argued that the parent could not represent their child's educational interest due to the fact he was over eighteen at the time the family moved to Fayette County.

The law also placed the burden on the Petitioner to appoint a representative for the child if his educational representation was under scrutiny.

No later than at the time of referral, the LEA shall determine if the child or youth is: (1) emancipated and, therefore, represents himself in educational decision making; or (2) to be represented by an adult *such as a parent, a guardian, or person acting as a parent,* a surrogate parent. 707 KAR 1:180 § 9(2)(a)(1) and (2)

At no time from August 1994 to December 1994 knowing the child's age did Petitioner appoint a surrogate parent or question the parents right to speak on behalf of their child. It was only after the Petitioner realized the cost of educating the child in residential placement that they moved to terminate their commitment to his educational plan. The Respondent had a duty to appoint a representative to protect the child's interest. They acknowledged the parents as the child's representative until December 1994. The Respondent's argument that the parents were not the child's educational representatives during August 1994-December 1994 would have left the child without a representative. The Petitioner has attempted to convince the administrative and judicial bodies throughout the Sixth Circuit that they acted appropriately. The Petitioner's arguments have been rejected by all authorities.

CONCLUSION

IDEA has left the issue of a student's residency for educational purposes to the state. The Sixth Circuit properly addressed the relationship between Kentucky law and IDEA in rendering its decision. The Petitioner has not presented a compelling reason why this Court should accept the review. The Petitioner has not successfully presented an issue which complies with considerations governing review on petition of certiorari, Supreme Court Rule 10.

Respectfully Submitted,

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